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The Utilities Commission and the Court are Powerless to Prevent Unjustly Discriminatory Rates; The Fat Lady is Singing – Loudly

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Case commented on: *Williams Energy (Canada) Inc v Alberta Utilities Commission*, 2014 ABCA 51

The Court of Appeal has confirmed that the scheme of the *Gas Utilities Act*, RSA 2000, c. G-5 (*GUA*) reserves to the Lieutenant Governor in Council the exclusive authority to determine which gas utilities will be subject to regulation by the Alberta Utilities Commission (AUC). Thus, while the AUC may make declaratory findings that an entity is a gas utility and that the utility is charging unjustly discriminatory rates, such declaratory findings are empty remedies for the customers of that utility unless and until the Lieutenant Governor in Council can be persuaded to make an Order in Council (OC) bringing that utility under full rate regulation.

I have posted on the long-running Ventures pipeline saga before (here) and I refer readers to that previous post for the background to the current proceeding before the Court of Appeal. Essentially the Court had already ruled on all of the above in those previous proceedings. The issue before the Court in this case was whether the Commission had correctly decided whether the AUC might be able to intervene on the basis of a provision in the *GUA*'s *Gas Utilities Exemption Regulation* (Alta Reg 53/99) to the effect that no OC would be required in "proceedings under section 36 or 45 of the Act in relation to NOVA Gas Transmission Ltd.". Of course that was not quite the issue since Williams first had to deal with the standard of review and thus ultimately the question became whether the Commission acted unreasonably in concluding that this provision was inapplicable.

The Commission had decided that this provision was not available in this case since Ventures was not NOVA but an affiliate of NOVA. Justice O'Ferrall, this time referring to his gatekeeper role as a single judge hearing a leave application (see my recent post on another leave decision of Justice O'Ferrall here) granted leave on that question (see 2013 ABCA 146; scroll down to the comment section of the earlier post to see my comment on that leave decision).

In this case the Court concluded that the standard of review was reasonableness and not correctness (at paras 13 – 14). Once that decision was made it was pretty clear what the outcome was going to be. In fact, the Court does little more than quote long passages from the Commission's decision before adding its own concluding paragraph:

> [30]… the construction given to the regulatory provision by the Commission does not, in our opinion, defeat the legislative purpose. The legislative objective may to some fly in the face of earlier sustained findings of discriminatory practice predicated on unreasonable rates. At the end of the day, however, the economic and fiscal considerations were expressly reserved for the executive branch of government, the effect of which limits the exercise by the Commission of its jurisdiction to fix rates. The Commission is prohibited from fixing rates under s. 36 without sanction from the Lieutenant Governor in Council in the form of either an Order in Council or in the form of an exemption as set out in the *Gas Utilities Exemption Regulation*. It is significant that the Commission has itself requested an Order in Council for the Ventures Pipeline in accordance with s. 5 of the *Gas Utilities Act*. No such Order in Council has been forthcoming.

This was probably going to be the outcome whatever the standard of review but it is worth questioning whether the standard here should have been correctness rather than reasonableness. There is a strong sense in which this was a true jurisdictional question – since the answer to the question determined whether the AUC had the authority to set just and reasonable rates for this pipeline. In deciding that the standard of review was reasonableness the Court places great weight on its earlier decision in this set of proceedings, *TransCanada Pipeline Ventures Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 55, where the issue was whether the Ventures Pipeline was a "gas utility":

> [14] This was a "threshold issue" to jurisdiction, yet this Court found at paras. 18 - 20 that the standard of review was reasonableness. It was up to the Commission to decide what was a "gas utility". Here the issue is what is an "exempt gas utility". The same result follows: the standard of review is reasonableness.

But it is not clear to me that the two situations really are comparable. The definition of "gas utility" is at the heart of the *GUA* and the AUC's jurisdiction. The same cannot be said of this *Exemption Regulation* which, I am guessing, rarely if ever fell to be interpreted by the Commission.

In any event, this must now be the end of the road for Williams unless it is able to get its Order in Council; but one suspects that if that was going to happen it would already have happened.

The only question now is just what is the fat lady singing? Perhaps I can persuade our blog coordinator Jennifer Koshan to come up with a prize for wittiest answer. Send your entries using the comment function or, if you prefer, directly to ndbankes@ucalgary.ca We would like to encourage some more reader participation in ABlawg!